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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 723

INTERNATIONAL ELEVATING COMPANY,
EMPLOYER,
Appellant,

vs.

FRIEDA S. MILLER, INDUSTRIAL COMMISSIONER, ET AL.,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

ARTHUR E. GODDARD,
Counsel for Appellant.

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STATEMENT AS TO JURISDICTION.

I.

The jurisdiction of the United States Supreme Court to review the decree in question upon appeal is sustained by § 237(a) of the Judicial Code.[1]

In this cause there is drawn in question the validity of the unemployment insurance of the State of New York, New York Labor Law, Article 18 (Chapter 31 of the Consolidated Laws) insofar as it is applied in the maritime field.

This law, which sets up a system of unemployment compensation, provides for payment to an unemployment in-

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[1] 28 U. S. C. §344.

surance fund of contributions by employers, measured by a percentage of their payrolls, and for payment of benefits to qualified employees who suffer unemployment. It contains no express exception of employment which is maritime in character and has been applied to such employment in this cause.

The final order sought to be reviewed was made and entered in the Court of Appeals of the State of New York, October 15th, 1942. The application for appeal in support of which these statements are made was presented December 30, 1942.

II.

The case involves the authority of New York State to apply its unemployment insurance law to an employment which is concededly maritime in character, contrary to Section 2 of Article III of the Constitution of the United States.

The application by a state of a statute, otherwise valid, beyond its proper jurisdiction under the Constitution draws in question to this extent the validity of the statute thus applied. A final decree sustaining such an improper application of a state statute may properly be reviewed on appeal by the Supreme Court of the United States.

Stewart & Co. v. *Sadrakula*, 309 U. S. 94.

III.

The Questions Presented Are Substantial.

In January 1936, the Attorney General of the State of New York rendered a published opinion, in which it was declared that, even in the absence of any express exception, the unemployment insurance law of New York could not be applied to employment entirely maritime in character. This opinion was based on Section 2 of Article III of the

Constitution of the United States, which had been held to limit the application of state workmen compensation laws.

Southern Pacific Co. v. *Jensen*, 244 U. S. 205.
Knickerbocker Ice Co. v. *Stewart*, 253 U. S. 149.
Washington v. *Dawson & Co.*, 264 U. S. 219.

Almost all of the forty-eight states recognized a similar limitation on their jurisdicton and expressly enacted a maritime exception in their respective unemployment insurance laws.

New York employers in the maritime field naturally relied on the opinion of their Attorney General. For a number of years they assumed that contributions under the unemployment insurance law were not to be taken into account in determining their general overhead. Not until June 1940, did this appellant learn that the Industrial Commissioner of the State did not concur with the Attorney General.

That the entire maritime industry is seriously concerned with the question here raised requires little argument. The financial stake of maritime employers generally is obvious: in New York they may be required to make contributions on payrolls for almost five years during which such contributions were apparently not to be exacted; elsewhere, by repeals of express exceptions they may be subjected to contributions in the future.

Maritime employees are denied the benefits of unemployment compensation by express exceptions in the unemployment laws of the various states, predicated on the constitutional doctrine repudiated in the present case as being inapplicable.

If, indeed, there is no constitutional obstacle standing in the way of application of state unemployment insurance laws to maritime workers, a determination by the United States Supreme Court to this effect would be the most

effective means of securing unemployment benefits for maritime employees generally, since it would serve general notice on all the states that their laws could be applied in the maritime field without violating the Constitution of the United States.

IV.

The question here presented was appropriately raised at the hearing before the Referee of the Industrial Commissioner.

The employer relied at the hearing and thereafter on rulings of the Federal administrative authorities (Record on Appeal, pp. 70, 71) and on a letter to the appellant from the Division of Unemployment Insurance of the State of New York (Record on Appeal, pp. 58, 59). The latter contained a statement that "the question of our jurisdiction of employees working on vessels operating in navigable waters in the United States may be involved. Employees thus employed are not covered by the law." After the hearing at which the letter from which the above quotation is made was offered in evidence on behalf of the appellant, the Referee rendered a decision in which he stated (Record on Appeal, fol. 51):

> "The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be in conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matter."[1a]

On appeal from the decision of the Referee holding that claimant had been engaged in employment subject to the New York law, the Unemployment Insurance Appeal Board affirmed, conceding, however, that claimant's employment

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[1a] All opinions rendered in this proceeding are appended hereto as required by Rule 12 of the Rules of the United States Supreme Court.

was maritime in character. The Board said in its opinion (Record on Appeal, fols. 22-24):

> "There is no provision in the New York State Unemployment Insurance Law specifically exempting from its provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from the provisions of the Unemployment Insurance Law."

The Board held that since claimant was not an officer or member of the crew within the exemption provided by Section 1607(c)(4) of the Internal Revenue Code (formerly Section 907 (c)(3) of Title IX of the Social Security Act), he was entitled to benefits under the state law.

Since, under Section 530.2 of the Labor Law (Chapter 31 of the Consolidated Laws) the Board's determination with respect to this individual claim was binding on appellant with respect to all similar employees, an appeal was taken to the Appellate Division of the Supreme Court of the State of New York, Third Department.

The Appellate Division reversed the Unemployment Insurance Appeal Board, holding that the application of the unemployment insurance law to claimant was a trespass on jurisdictional domain of the United States.[2] The Court in its opinion said (Record on Appeal, fols. 242-243):

> "This jurisdiction is pursuant to section 2 of article III of the Constitution of the United States. It cannot

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[2] 262 App. Div. 654.

be delegated to the several States. The grant of admiralty jurisdiction to the federal government was: '* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *.' *(Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 194.) This purpose would be violated if the Board's decision herein were upheld."

The Appellate Division cited as an additional ground for reversal, the fact that Section 1607 (c)(4) of the Internal Revenue Code (Section 907 (c)(3) of Title IX of the Social Security Act) excepted "service performed as an officer or member of a crew of a vessel in navigable waters in the United States."

The Industrial Commissioner appealed from the Appellate Division to the Court of Appeals and the latter court reversed the Appellate Division, holding:[3]

(1) There is no constitutional obstacle to the application of the unemployment insurance law to maritime employments generally;

(2) There is no constitutional barrier by reason of the exception of employment by an officer and members of the crew on a vessel in navigable waters of the United States, enacted by Congress in the Social Security Act (Internal Revenue Code, Section 1607 (c)(4); and

(3) There was substantial evidence to sustain the findings by the Appeal Board that claimant was not an officer or member of a crew of a vessel upon the navigable waters of the United States and that in consequence the determination of the Appeal Board was conclusive on the courts.

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[3] 289 N. Y. 119.

Conclusion.

This is a proper cause for the allowance of an appeal to the Supreme Court of the United States.

Respectfully submitted,

ARTHUR E. GODDARD,
Counsel for Appellant.

APPENDIX "A".

Findings of Fact and Decision of Referee.

STATE OF NEW YORK DEPARTMENT OF LABOR,
UNEMPLOYMENT INSURANCE REFEREES' UNIT.

Index No. 533-96-40R.

Date: July 9, 1940.

S. S. No. 052-03-7216.
Claimant: Joseph Bergen.
Referee: Henry Eisen.
At: 342 Madison Avenue, N. Y. C.
On: June 12, 1940.

Appearances:

Joseph Bergen, Claimant.

International Elevating Co., Employer, by Frank N. Van Emberg, Assistant Treasurer.

Cullen & Dykman, Esqs., Counsel for Employer, by Robert Lisle, Esq., of Counsel.

Harry Rosen, Esq., representing the Legal Bureau, Division of Placement and Unemployment Insurance.

Issue:

Whether or not claimant's employment is maritime in nature and as such exempted under the provisions of the Unemployment Insurance Law.

From the testimony adduced, the following are the

Findings of Fact:

The claimant was employed by the corporation hereinafter designated in 1938 and 1939. His duties were those of a "header" or "trimmer" in connection with handling of grain. These services were performed on vessels plying in navigable waters in and about the New York harbor and tributary streams.

The vessels are known as grain elevators, documented under the laws of the United States. Since the home port

is New York City, the elevators are duly registered at the New York Custom House. The hailing port is Jersey City, New Jersey. The floating elevators are self-propelled and generate their own power. Their function is to transfer grain in bulk to ocean-going vessels. This grain is brought to the New York harbor in vessels from other ports. The ultimate destination of the grain is the foreign countries.

The principal handling method involves the use of an elevator leg for direct vertical lifts. An endless chain of buckets scoop up the grain and carry it overhead where it is turned out by inversion of the buckets and dropped into the receiving steamer through a pipe. The work entailed is exclusively related to the handling, transferring and delivering grain in bulk, requiring its weighing, cleaning and storing. Obviously these operations, in the main represent a commercial occupation rather than a maritime pursuit. In no sense is such a vocation allied with navigation or the welfare of a vessel.

The claimant and co-workers are members of a union. This organization, because of a "closed shop" agreement with the employer is the exclusive source of supply of the grain handlers. Compensation for the services of these workers is measured solely by a predetermined fixed union scale of five dollars per thousand bushels handled.

The elevators have full complements of crews, such as captain, engineers, deckhands, etc. This personnel is distinct from the grain workers. It is significant that when the elevator is navigated, the captain is in full command of the elevator. When, however, the elevator is engaged in the process of transferring, trimming, weighing and shoveling the grain, the responsibility for supervision is shifted to a superintendent.

The company herein has not filed reports with or paid contributions to the New York State Unemployment Insurance fund, taking the ground that all grain workers are in maritime employment. A ruling made by the Federal Treasury Department takes the position that such employees are members of crews and are excepted from tax liability under Section 811(b)(5) of the Social Security Act. A similar ruling was made tentatively by a former acting executive director of the Division of Unemployment

Insurance, which however was conditioned upon further information requested from the company but not subsequently supplied.

These ex-parte determinations are not binding upon the claimant. It becomes necessary, therefore, to examine the facts and circumstances to ascertain whether in the instant case, the maritime law has such exclusive jurisdiction as to exempt grain trimmers from the benefits provided in the Unemployment Insurance Law.

The Unemployment Insurance Act is silent with respect to maritime workers. Nevertheless interpretation may not be made that would be in conflict with the provisions of the Constitution of the United States which empowers Congress to legislate with respect to maritime and admiralty matters.

An intrastate tax designed to add a formalized right to wage earners of the instant type who become unemployed through no fault of their own is not in contravention of the substance of admiralty laws. The Unemployment Insurance Act is part of social reforms approved and encouraged by the United States Government. To exclude from coverage a large class of workers who take no part in the navigation of vessels would seem inconsistent with and indeed a negation of the intent to bring all industrial workers within the protection of the Unemployment Insurance Law against the hazards of unemployment, except those specifically exempted by the Act. It is the function of the State to designate the choice of beneficiaries. In the selective process, it is the status and nature of the work which must be given due emphasis, rather than some obscure construction of the maritime law. Thus the opinion is held that no valid reason exists for placing the workers herein considered in the same category as officers and members of the crews of vessels. A similar conclusion was reached by the Appeal Board with respect to dredge workers (Case 1180-39).

The earnings are not in dispute. The employer who is subject to the Unemployment Insurance Law, submitted wage credits corresponding to the sums tabulated herein.

It is conceded also that the greater portion of the work performed was in the waters adjacent to the State of New York. This data is detailed in an affidavit filed in the claims folder and made part of the record, and supplements the evidence adduced.

Based upon the record and testimony, the amounts as set forth herewith are allowed:

		1938.		
	First Quarter.	Second Quarter.	Third Quarter.	Fourth Quarter.
International Elevating Co., 2 Broadway, N. Y. C.	305.18	110.82	279.21	195.23
		1939.		
	143.80	8.53	185.71	416.03

Decision:

Upon all the evidence, I find that the claimant is not an officer or a member of a crew of a vessel. His employment is not exempted under the provisions of the Unemployment Insurance Law. The employer herein is liable for tax contributions on his wages and the wages of all others similarly situated. I also find that the claimant had earnings in covered employment in the sums as herein tabulated and is entitled to benefit rights based upon these figures, subject to local office records as to weeks of total unemployment.

Copy of this decision is being forwarded to the Bureau of Tax and Wage Records for the collection of contributions due.

HENRY EISEN,
Referee.

Joseph Bergen, 7314 Fifth Ave., Brooklyn, N. Y.
International Elevating Co., 2 Broadway, N. Y. C.
Harry I. Rosen, Esq., 342 Madison Ave., N. Y. C.
Cullen & Dykman, 177 Montague Street, Brooklyn, N. Y.
L. Goldberg, Bk. 347, 6/12/40.
E. Taylor, Bk. 197, 7/8/40.

APPENDIX "B".

Findings of Fact, Opinion and Decision of Unemployment Insurance Appeal Board.

State of New York — Case #3538-40

Department of Labor — 533-96-40R

Unemployment Insurance Appeal Board

Re: Name

S. S. No..... Employer No.....

The employer appeals from the decision of the referee dated July 9, 1940, holding that claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings therein.

Hearings were held before the referee at which the claimant, the employer corporation, by its assistant treasurer, its attorney and a representative of the Industrial Commissioner were present and were accorded full opportunity to be heard. Briefs have been submitted on behalf of the employer and the Industrial Commissioner for the consideration of the Board.

Based on the record and the testimony in this case, the Board makes the following

Findings of Fact:

Claimant was employed by appellant during 1938 and 1939. There is no dispute as to the length of claimant's employment or as to the amount of his earnings. The question in dispute is whether or not claimant worked in employment subject to the law.

Claimant was a ship-trimmer in connection with the handling of grain. His services were performed on floating grain elevators, which are documented under the laws of the United States. These elevators are self-propelled and generate their own power. The function of the elevators is to transfer grain in bulk between ocean-going vessels and canal boats or other boats. The work of the claimant dur-

ing 1938 and 1939 was the storing and trimming of grain in the holds of the ships.

Claimant was a member of a local union of the International Longshoremen's Association. The employer had a closed shop agreement with said union and only members of the union worked on the grain elevators. Compensation for the services of the union members was measured by a predetermined fixed scale of $5.00 for each thousand bushels handled. The trimmers usually met in a union meeting room on South Street in the City of New York, and if a job was available, all would proceed from the meeting room to the job.

Claimant did not perform any work on the grain elevator until it had been tied up alongside the steamer and the harbor vessel between which the transfer of grain was to be effectuated. Occasionally, after one job was done there was another job to be done on a vessel tied up at a different pier. In that event, claimant had his choice of proceeding by land to the other job or remaining on the grain elevator and being transported thereon, in which event he did not participate in the navigation of the vessel.

Claimant's work was all performed under the supervision of a superintendent in appellant's employ and not under the supervision of the captain of the grain elevator.

While the boat was under way from one pier to another, it was then under the supervision of the captain of the vessel who was a licensed individual.

Claimant did not sign any ship's articles. He was not fed on the ship and when he went to lunch he had to go to a restaurant situated on the shore. Claimant lived in the Borough of Brooklyn and went home to his residence every night. He worked eight hours a day and any work done thereafter was considered overtime. On a few rare occasions when the claimant was too tired to go home, he slept on the floor of the boat, as there were no sleeping accommodations on the boat.

It has been conceded by the employer that the greater part of the work performed by the claimant in 1938 and 1939, prior to June 3, 1939, was in the State of New York and that the base of operations after June 3, 1939, was in the State of New York.

OPINION:

The issue to be determined herein is whether or not the claimant worked in employment subject to the Unemployment Insurance Law.

It is the contention of the appellant that the claimant was an officer or member of a crew, and therefore comes within the exemption as outlined under the Social Security Act and the Internal Revenue Code, and that under said circumstances the State of New York has no jurisdiction in this case.

Title 9 of the Social Security Act as amended is not contained in the Internal Revenue Code, except Section 904. The Code provides:

"The term 'employment' means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

• • • • • • •

(4) Service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; • • •" (Section 1607-(c) (4)).

There is no provision in the New York State Unemployment Insurance Law specifically exempting from its provisions an officer or member of the crew of a vessel on the navigable waters of the United States. The Act therefore applies to the claimant unless it is in conflict with some provision of the State or Federal Constitution. The employer contends that as far as the claimant is concerned, the application of the Act to him would bring said Act in conflict with that provision of the Federal Constitution which grants to the United States Government exclusive jurisdiction over admiralty and maritime matters. We have previously held that the maritime nature of employment in and of itself does not exempt the employer from

the provisions of the Unemployment Insurance Law (Appeal Board 1180-39).

There is no question that the grain elevator on which the claimant performed his services was a vessel within the meaning of that term and there is also no question that the waters on which said services were performed were navigable waters of the United States.

Therefore, the question to be decided by us is whether or not the claimant's services were performed as an officer or member of a crew. If we find that such services were performed as an officer or member of a crew, then the appellant must prevail and New York State would have no jurisdiction over the claimant and the employer herein. If, however, we find that the claimant's services were not performed as an officer or member of a crew, then the claimant is an employee, working in employment subject to the Unemployment Insurance Law.

Regulation 90 relates to the excise tax on employers under Title 9 of the Social Security Act, which refers to unemployment insurance tax on employers of eight or more. Article 206(3) of Regulation 90 gives the following definition of "officers and members of the crew":

"The expression 'officers and members of the crew' includes the master or officer in charge of the vessel, however designated, and every individual, subject to his authority, serving on board and contributing in any way to the operation and welfare of the vessel. The exception extends, for example, to services rendered by the master, mates, pilots, pursers, surgeons, stewards, engineers, firemen, cooks, clerks, carpenters, deck hands, porters, and chambermaids and by seal hunters and fishermen on sealing and fishing vessels."

Since the phrase "officers and members of the crew" is a phrase of exclusion, it must therefore be given a narrow construction. The appellant relies on the case of *The Buena Ventura*, 243 Fed. 797, to the effect that a wireless operator hired and paid by an independent contractor was considered a member of a crew. In that case, the justice presiding stated that it was his opinion that a wireless operator was

a far more important person in the safe operation of a voyaging vessel than a fireman, cook, or the like, but said:

"It is preferred to put the decision on this broad ground: i.e.; that a man who serves the ship as a result of a contractual relation of any kind, and serves her *in her navigation*, is a member of the crew and entitled to the privileges of a seaman." (*The Buena Ventura*, 243 Fed. 797). (Italics ours.)

The Justice further went on to give a definition of the word "crew" as follows:

"The word 'crew' is explicitly considered in *United States* v. *Winn*, 3 Sum. 209 Fed. Cas. No. 16,740. What Justice Story there said has not been improved upon, though the language of Dodge, J. in *The Bound Brook* (D. C.), 146 Fed. at 164 may be quoted as a fair summary:

'When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her *aiding in her navigation*, without reference to the nature of the arrangement under which they are on board • • •.'" (Italics ours.)

Judge Deadly aptly stated the definition as follows:

"The words 'crews of the vessels' as here used, include all of the ship's company—all the seamen and officers except the captain (Rap. and L. Law Dict. Verb. 'crew'—*U. S.* v. *Winn*, 3 Sum. 209).

"The crew of a vessel—the ship's company—in a general sense, comprises all persons, who, in pursuance of some contract or arrangement with the owner or master are on board the same *aiding in the navigation thereof*" (*The Marie* (*Dominick Dupee, Libellant*), 49 Fed. 287). (Italics ours.)

It is to be expressly noted, therefore, that in order for the work performed by the claimant in the instant case to come within the phrase "officers and members of the crew" he must contribute to the operation and welfare of the vessel and aid in the navigation thereof.

In the instant case, the claimant did not start to work until the grain elevator was tied alongside the boat either from which or to which the grain was to be transferred. At that moment the captain relinquished control and the superintendent in charge took over the operation of the transfer of the grain. The work performed by the claimant was merely transferring the grain between two boats. The work performed by the claimant was not essential and did not contribute to the operation and welfare of the vessel as a means of navigation, nor did his work aid in the navigation of the boat.

The claimant never performed any work while the elevator was being transported from one pier to another, but started his work after the elevator had been tied alongside the boat to which the grain was to be transferred.

The claimant belonged to a union of trimmers. They met in a union meeting room in South Street, New York. They proceeded from said union meeting room to the job, wherever said job was located. They worked eight hours a day and any time spent working thereafter was considered overtime. They were not fed on board ship. It was unnecessary for the claimant or any member of the union to sign ship's articles. Claimant was under the supervision of a superintendent who was a different person than the master of the boat. The master of the boat, the captain, was necessarily a licensed individual and the crew consisted of engineers, firemen and deckmen.

Since we have come to the conclusion that the work performed by the claimant was not in furtherance of the operation and welfare of the vessel as an instrument of navigation, it necessarily follows that the claimant worked in employment subject to the Unemployment Insurance Law.

Decision:

Claimant worked in employment subject to the Unemployment Insurance Law and is entitled to be credited with his earnings as fixed by the referee.

The decision of the referee is affirmed.

Dated: December 6, 1940.

(S.) I. D. Neustein,
Member.

APPENDIX "C".

Opinion of Appellate Division.

262 App. Div. 654.

SCHENCK, *J.*:

This is an appeal by International Elevating Company, an employer, from a decision of the Unemployment Insurance Appeal Board which affirmed a decision of a referee holding the claimant herein to be entitled to benefits under the Unemployment Insurance Law (Labor Law, art. 18, §§ 500-539) of New York State. The controversy is in regard to the question of whether the claimant was or was not engaged in the maritime field or navigable waters of the United States in such manner as to be outside the scope of the power of the State of New York in this respect.

The claimant was employed as a "grain trimmer" in connection with the operation of floating grain elevators owned and operated by the employer herein. The elevators were used in the business of loading and unloading grain to and from vessels in the harbor of New York. In brief, the business of the employer was to transfer grain from one vessel to another as, for example, to transfer a cargo of grain from an ocean-going ship to a barge for further transportation. The elevators used in the business are self-propelling. They are made fast to the steamship from which or to which the transfer is to be made while the ship is at the pier. Thereupon the vessel to which or from which the grain is to be transferred comes alongside the elevator and the transfer is made via the elevator.

Trimmers, such as claimant, work not only on the elevator itself but also in the holds of the discharging or receiving vessels: They operate steam shovels which push the grain to the elevator "leg", see to the "trimming" of the grain in the two holds, handle ship lines and perform other similar duties. They never work on shore. Some of the piers at which the elevators are used are located in New York; others are in New Jersey. Claimant has worked at piers in both States during the period involved herein.

Under the foregoing facts, it seems clear to me that this claimant has been engaged in interstate commerce on the navigable waters of the United States. He is accordingly not subject to the jurisdiction of either New York State or New Jersey (although under the decisions of the Board he might be subject to both), but rather is subject solely, in respect to the matter in controversy here, to the admiralty and maritime jurisdiction of the United States.

This jurisdiction is pursuant to section 2 of Article III of the Constitution of the United States. It cannot be delegated to the several States. The grant of admiralty jurisdiction to the Federal government was: "* * * to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation * * *." (*Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149.) This purpose would be violated if the Board's decision herein were upheld.

The New York Workmen's Compensation Law has been held inapplicable to carpenters, rock-loaders, boiler-workers, and watchmen on various types of vessels, engaged in operations similar to those here, on the ground that they were engaged in maritime employment. (See *Matter of Doey* v. *Howland Co.*, 224 N. Y. 30; *Matter of Keator* v. *Rock Plaster Manufacturing Co.*, Id., 540; *Norman* v. *Merritt & Chapman Derrick & Wrecking Co.*, 200 App. Div. 360.)

There is no basic distinction between the Unemployment Insurance Law and the Workmen's Compensation Law so far as fundamental jurisdiction is concerned. It follows that the employer herein cannot be subjected to the New York State Unemployment Insurance Law. The decision of the Board must, accordingly, be reversed.

It is unnecessary to go into the Federal and State statutes that might otherwise be involved. Suffice to say that title IX of the former Social Security Act excepts from the term employment "service performed as an officer or member of the crew of a vessel on the navigable waters of the United States." (Internal Revenue Code (U. S. Code, tit. 26), § 1607, subd. (c), ¶ (4).) This is superfluous in view of the

above-mentioned constitutional provision upon the point but is referred to as being an additional ground for reversal here.

The decision of the Unemployment Insurance Appeal Board should be reversed, with costs.

APPENDIX "D".

Opinion of Court of Appeals.

(Decided sub nom Matter of Cassaretakis 289 N. Y. 119).

FINCH, J.:

These six appeals present the question whether the New York unemployment insurance law (Labor Law, art. 18; Cons. Laws, ch. 31) imposing a pay-roll tax upon all employers of four or more employees, without discrimination and without exception here material, is applicable to marine employments.

In four of the above cases the Unemployment Insurance Appeal Board has found that the claimants had been employed as members of the crews of vessels on the navigable waters of the United States and for that reason the Board held that they were not covered by the unemployment insurance law. In the two remaining cases (*Matter of Cassaretakis* and *Matter of Bergen*) the Board has found that the claimants, although engaged in marine employments, had not been employed as members of the crews of vessels on the navigable waters of the United States, and on this basis held that they were covered by the statute in question.

Upon appeal to the Appellate Division, the decision of the Board in the four cases first mentioned above was sustained. In the other two cases, however, the determinations were reversed upon the ground that, by reason of the admiralty clause of the Federal Constitution, the unemployment insurance statute may not be held applicable to maritime employments.

The definition of employment contained in the New York Act (Labor Law, § 502) is admittedly sufficiently broad to cover all maritime employments, including service as an officer or member of a crew of a vessel upon navigable waters of the United States, provided the whole or greater part of such employment is performed within this State. The Federal statute (U. S. Code, tit. 26, § 1607, subd. c), on the other hand, specifically excludes from the tax levied thereunder services rendered as officer or member of a crew of a vessel upon the navigable waters of the United States.

Whether or not an individual is a member of a crew of a vessel on the navigable waters of the United States presents primarily a question of fact which turns generally on whether the individual serves the ship in her navigation. (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 259) In consequence the determination of the Appeal Board, if sustained by substantial evidence, is conclusive upon the courts. (Labor Law, art. 18, § 534; *Matter of Morton*, 284 N. Y. 167.) Upon this record there is substantial evidence to sustain the findings of fact in this regard of the Appeal Board. As to the four claimants who were found to be members of the crews of vessels, Sheredos was a cook on a self-propelled vessel carrying petroleum between points in New York and New Jersey; Schein was an attendant on a speed boat which transported passengers from a New York city pier to the World's Fair; Knowlson was second engineer on a tugboat; Smith was a fireman on a lighter. All were plainly members of crews of vessels. On the other hand, Cassaretakis was assistant cook on board a dredge which was employed in a land filling operation in connection with the construction of a public highway. Bergen was a grain-trimmer on a floating grain elevator, his work being in connection with transfer of grain from one barge to another for purposes of further transportation. The employment of these two latter claimants, therefore, may be deemed incidental to construction and stevedoring operations, respectively, rather than to navigation. In consequence, Cassaretakis and Bergen, although concededly engaged in general maritime employment, were not members of crews of vessels on the navigable waters of the United

States. These two claimants have, moreover, been found to be engaged in employment the whole or greater part of which was transacted within this State.

Two questions of law are raised, (1) whether there is constitutional objection to the application of the statute in question to maritime employments generally, and (2) if there is no such constitutional objection, whether the Congress preempted that part of the field relating to navigation by enacting a statutory prohibition against coverage by the State law, of officers and members of the crew of a vessel on the navigable waters of the United States.

In order to induce the several States to enact unemployment insurance statutes, the Federal government, by the Federal Unemployment Tax Act (Internal Revenue Code, U. S. Code, Tit. 26, §§ 1600, 1601) levied a pay-roll tax upon employers, with certain exceptions, but allowed a credit up to ninety per cent of the Federal pay-roll tax to employers on account of contributions paid for State unemployment insurance. On its part the State of New York has levied a pay-roll tax upon employers measured by a percentage of the pay-roll and assessed upon all employers generally without regard to the nature of employment, with certain exceptions not here material (Labor Law, art. 18, §§ 515, 516). Neither the National nor the State government contributes anything to the fund. The moneys collected by means of this tax are used for the relief of the unemployed, concededly an object within the powers of the State (*Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495).

This tax is an excise based upon the exercise of the privilege of employing individuals. (*Steward Machine Co. v. Davis*, 301 U. S. 548, 578-583; *Carmichael v. Southern Coal & Coke Co. supra; Patton v. Brady*, 184 U. S. 608.) The obligations of the employer under this law are not to his employees but to the State. Likewise, claimants of benefits assert their rights against the State and not against the employer. The employer's duty to pay contributions and the employee's right to receive benefits are independent of each other. The employer must continue to pay the tax although none of his employees ever becomes entitled to benefits through lack of employment; the employee has a

right to receive benefits upon becoming unemployed although his employer has failed to contribute.

A mere statement of this State law demonstrates that it does not modify or attempt to modify, alter or supplement the rights and liabilities of the parties to any maritime contract, nor does it touch remedies enforceable in admiralty. This tax exists independently of the employment out of which it arises. The measure of the tax by the amount of wages paid does not make the tax less independent of the occupation. Conceding that these claimants performed services under a maritime contract of employment, nothing in the challenged statute in any way changes, modifies or affects the reciprocal rights and duties of the employer and employee arising out of the maritime contracts or the remedies enforceable in admiralty. There is a fundamental distinction between statutes which interfere with the rights and obligations of the parties to a maritime contract, as between themselves, and a statute which effects no such interference.

The power to levy such an excise tax and to use the funds thus raised for local purposes is a sovereign power reserved to the States, of which they were not deprived by the Constitution of the United States. In *Carmichael v. Southern Coal & Coke Co.*, Mr. Justice Stone (now chief justice) said: "Taxes * * * may likewise be laid on the exercise of personal rights and privileges. As has been pointed out by the opinion in the *Chas. C. Steward Machine Co.* case, such levies, including taxes on the exercise of the right to employ or to be employed, were known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation, which was an attribute of the sovereign power of the States at the time of the adoption of the Constitution, and which was reserved to them by that instrument" (p. 608).

It is contended, however, that the State may not thus exercise its reserved powers of taxation because it involves a conflict with paramount powers vested in the Federal government in two respects; *first*, the State law is alleged to interfere with and burden maritime commerce in its

national and international aspects as to which Congress alone has power to legislate; *second*, the State law is also alleged to contravene the essential purposes of and to work prejudice to characteristic features of the maritime law, and to interfere with its proper harmony and uniformity in its interstate and international relations.

The paramount power of Congress to legislate in the field of maritime law is implied from the grant to the Federal courts in section 2 of article III of the Federal Constitution, of judicial power in all cases involving admiralty and maritime jurisdiction. It is, however, well settled that in the maritime field, just as in the field of interstate commerce generally, the state has power to act in matters of merely local concern, which do not require uniform national legislation. (*Cooley v. Board of Wardens*, 12 How. [U. S.] 299.) One engaged in an interstate business may be lawfully subjected to a state tax upon the instruments employed in that business (*Western Union Telegraph Co. v. Attorney-General*, 125 U. S. 530), and this is so even though such commerce is maritime in nature. (*Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 305.)

In addition, by section 1606, subd. (a) of the Federal Tax Act, the Congress has declared that state unemployment insurance laws may be applied to interstate commerce. And in *Perkins* v. *Pennsylvania*, 314 U. S. 586; affg., 342 Penn. St. 529) the Supreme Court has held that there is no constitutional obstacle under the commerce clause to the application of the Pennsylvania unemployment insurance law to those employed in interstate commerce. This would seem to be a conclusive determination that unemployment among those engaged in interstate commerce in general is a matter of local concern as to which no uniform national legislation is needed and in which field, therefore, the states may constitutionally legislate.

As to the second objection noted above and based upon the limitations upon state legislation stated in *Southern Pacific Co.* v. *Jensen* (244 U. S. 205) it would seem to be a sufficient answer to repeat that the enactment in question is a taxing statute designed to raise funds for a state purpose. It does not, therefore, attempt to alter the contract of employment between master and servant or to change

the rights and remedies enforceable in admiralty as incidental to that relationship. It does not create any new rights or liabilities between the parties. Nothing contained therein would cause a court of admiralty to alter in any respect the body of law which it applies to the cases pending before it.

That a state may, within prescribed limits, enter into the field of maritime law and add to or modify remedies enforceable in admiralty was conceded by Mr. Justice McReynolds in the *Jensen* case. In *Just* v. *Chambers* (312 U. S. 383) a statute of the State of Florida, providing that a cause of action for personal injuries shall survive the death of the tort feasor, was held to be applicable in a court of admiralty to an action against the owner of a vessel on account of injuries occurring on navigable waters within the State boundaries. The State law, it was said, did not offend the criteria of essential purpose and uniformity laid down in the *Jensen* case. If, therefore, the states may, within the prescribed limits, actually add to the remedies under maritime law, *a fortiori*, the legislation in the case at bar may not be held to have over-ridden the limitations set forth in the *Jensen* case.

Respondents point to a line of authorities (*Southern Pacific* v. *Jensen, supra; Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469) holding workmen's compensation statutes invalid as interfering with the characteristic features and essential uniformity of admiralty law. These cases all rest upon the principle that the workmen's compensation laws set aside the common law rules respecting the rights and liabilities of employer and employee and substituted new rules for determining such rights and liabilities. These statutes become a part of the contract and thereby directly affect the rights and duties between the parties. As was said by this court in *Matter of Doey* v. *Howland Co.* (224 N. Y. 30, 36): "An award under the Workmen's Compensation Law is not made on the theory that a tort has been committed; on the contrary, it is upon the theory that the statute giving the commission power to make an award is read into and becomes a part of the contract. (*Matter of Post* v. *Burger &*

Cohlke, 216 N. Y. 544.) The contract of employment, by virtue of the statute, contains an implied provision that the employer, if the employee be injured, will pay to him a certain sum to compensate for injuries sustained, or if death results, a certain sum to dependents."

A clear distinction between these cases and that of the unemployment insurance law is that the latter does not in any way operate upon the contract of employment or interfere with maritime and admiralty jurisdiction. The payment of an excise tax upon the privilege of employing others can no more be considered an unwarranted intrusion by the states into admiralty jurisdiction than can numerous other state taxes previously upheld; for instance, franchise taxes upon towing companies *(People ex rel. Cornell Steamboat Co.* v. *Sohmer,* 235 U. S. 549); taxation of insurance companies upon the writing of marine insurance policies *(Aetna Ins. Co.* v. *Houston Oil & Transport Co.,* 49 Fed. Rep. [2d] 121); taxes upon shipping *(Transportation Co.* v. *Wheeling,* 99 U. S. 273); and tolls levied upon interstate and foreign shipping using state-improved waterways. (*Sands* v. *Manistee River Improvement Co.,* 123 U. S. 288.)

It follows that there is no constitutional objection to coverage of maritime employments by the Unemployment Insurance Act of New York State.

We are thus brought to the second question, namely, whether by virtue of the provisions of section 1607 (subd. c) (par. 4) of the Internal Revenue Code (U. S. Code, tit. 26) the officers and members of the crew of a vessel on the navigable waters of the United States have been specifically excluded by Congress from coverage by state laws. We may assume that Congress has the constitutional right under the admiralty clause of the Federal Constitution, to exclude maritime employments from coverage by state unemployment insurance.

In other words does the fact that the Federal Act in the case at bar exempts from its operation the officers and crews of vessels on navigable waters prevent the states from covering maritime employment in the unemployment insurance laws which they have enacted?

From the nature of the independent power reserved to the states of taxing for their own support and to promote

the general welfare of their inhabitants, there has been developed the principle that it will not be presumed that Congress intended to exclude the reserved powers of the state by virtue of paramount powers vested in Congress by the Federal Constitution unless an actual conflict exists between Federal and State legislation. In *Savage* v. *Jones* (225 U. S. 501) the court lays down this principle (at p. 533): "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State."

A comparison of the Federal tax act and our State unemployment insurance act shows that there is no actual conflict between them even when the State act is construed to cover employments expressly exempted under the Federal taxing statute.

The Federal statute, of course, is not an unemployment insurance law. It is a mere taxing statute but contains a provision allowing ninety per cent of contributions exacted thereunder to be credited by employers against contributions paid under certified state systems. This credit arrangement was designed to give the states an incentive to enact their own unemployment insurance laws and to protect those states which enacted such laws against being put at a competitive disadvantage as against other states which might fail to take such action. Congress evidently believed that these objects could be accomplished by taking only certain kinds of employment while exempting other kinds. The states in creating their unemployment systems, on the other hand, had different objectives in view in canvassing the kinds of employment to be covered or excluded under their statutes. Their problem was to decide what types of employment seriously required the protection of an unemployment compensation law and what types could practically be included within such a system. Whatever types of employment the Congress might exclude, the states might exempt wholly different types upon the ground that employees in these categories did not require such protection

or else that it would be impracticable or impolitic to furnish them with such protection. There is, therefore, no necessary similarity as to the types of employment either covered or exempted by the Federal and state statutes respectively.

The legislative history and the judicial interpretation of the Federal statute amply demonstrate that it was not intended thereby to strait-jacket the states in the enactment of their own unemployment insurance laws. (See Senate Report, No. 628, Cal. No. 661, 74th Congress, p. 14; *Steward Machine Co.* v. *Davis, supra,* at pp. 593, 594.) The conclusion is inescapable that Congress intended to leave to the states the widest possible latitude in setting up their unemployment compensation systems both as to the kind and extent of coverage provided. This broad policy may not be overridden by the exemptions contained in section 1607 (subd. c) (par. 4).

One word should be said in conclusion as to the argument advanced that great practical difficulties lie in the way of the states providing benefits for seamen, the nature of whose work may take them into many other states and even into foreign parts. A picture is drawn of the hopeless confusion into which maritime employment may be plunged if a number of states attempted to apply conflicting state statutes to the same employer-employee relationship. The difficulty conjured up would appear to be more imaginary than real and in no event could affect the result arrived at herein. It may be that Congress will in future decide to appropriate the entire marine field to a uniform unemployment insurance system. Such congressional action might effectively oust the states from the field because of the paramount power vested in Congress by section 2 of article III of the Federal Constitution. It is sufficient for the purpose of these appeals, however, to say that no such obstacle stands in the way of state legislation at the present time.

It follows that in the cases of the claimants, Cassaretakis and Bergen, the orders of the Appellate Division should be reversed and the determination of the Unemployment Insurance Appeal Board affirmed; in the cases involving Sheredos, Knowlson, Schein and Smith, the orders of the

Appellate Division and the determination of the Unemployment Insurance Appeal Board should be reversed and the cases remitted to such Appeal Board for proceedings in accordance with this opinion, all with costs in the court and in the Appellate Division.

Lehman, Ch. J., Loughran, Rippey, Lewis, Conway and Desmond, JJ., concur.

Ordered accordingly.

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